FAA-98-4379-6

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November 4, 1998

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HAND DELIVERY
Anthony N. Palladino, Esq.
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition, AGC-70
Office of the Chief Counsel
Federal Aviation Administration
400 Seventh Street, SW, Room 8332
Washington, DC 20590

Dear Tony:

Enclosed are ABA Comments on the FAA Proposed Rules covering both procedures for protest actions and contract disputes. These Comments are also being circulated today to officers and Council members of the Public Contracts Section as well as members of the various ABA subcommittees who have an interest in your regulations.

I have left a message with your office asking you to call me. Alan Gourley has suggested that it would enhance the presentation of the topic to the Council on Saturday morning if you were willing to present a short overview of the Proposed Rules and to answer questions as well. Both David Churchill and I agree with his suggestion. Hopefully, you won't mind doing so and we can coordinate matters at the CDA presentation on Friday.

Sincerely,

Jim

James J. Regan

Enclosures

cc: Alan W. H.Gourley, Esq.

DRAFT

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November __, 1998

U.S. Department of Transportation Dockets
Docket No. FAA -98-29310
400 7th Street, N.W.
Room 401
Washington, D.C. 20590

Re: Proposed Rule: Request for Comments
63 Federal Register 45371 (August 25, 1998)
Procedures for Protest and Contracts Disputes

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies. Services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors and. therefore, should not be construed as representing the policy of the American Bar Association.

These comments address the Federal Aviation Administration's ("FAA") proposed 14 C.F.R. Part 17 procedures for resolving protests and disputes that

arise in connection with FAA procurements. They do not address the conforming amendments proposed to 14 C.F.R. Part 14 which relate to recovery of attorneys fees under the Equal Access to Justice Act.

I. OVERVIEW

The Section supports the FAA's efforts to streamline its procurement management system and to provide opportunities for informal resolution of protests and contract disputes. Nonetheless, the Section has noted concerns with a number of the proposed rules including the following most significant issues:

- Congress has not exempted FAA's procurements from Tucker Act and Contract Disputes Act jurisdiction. While the Section applauds and supports efforts at the FAA (and elsewhere within the federal government) to experiment with alternatives for resolving, at the agency level. bid protests and contract disputes. access to court must be preserved for appropriate cases. The proposed rules should openly acknowledge the existence of the fora available under the Tucker Act and the CDA.

  The protest procedures should be modified in a number of respects, but including, most significantly:

  - Removing the presumption against suspension of a challenged award and providing procedural safeguards to ensure that the Office of Disputes Resolution for Acquisition can make an informed and balanced decision on the appropriateness of suspension in specific cases.

  - Procedural aspects of protests. including submissions, document production and other discovery, and hearings, should provide adequate due process to permit an aggrieved offeror to present its case adequately and obtain fair consideration of its protest.

  - The requirements for intervention and standing must be modified to recognize and permit involvement of any offeror, or potential offeror, who has. or would. suffer a direct economic harm from the challenged award or Screening Information Request.

- The disputes procedures should be modified in a number of respects, including, most significantly:

- The rules should employ the normal definition of "accrual" of a contract dispute. increase the six-month period for submission of a contract dispute to the ODRA, and make the limitations period, equally applicable to contractor and government initiated contract disputes.

  The rules must provide for discovery and a hearing as a matter of right in adjudicated cases.

II. THE FAA'S AUTHORITY IS LIMITED BY THE TUCKER ACT AND THE CONTRACT DISPUTES ACT

As a threshold matter. the proposed rules rest on an incorrect legal premise. Congress has not granted the FAA an exemption from either Tucker Act jurisdiction (28 U.S.C. § 1491) or the mandated dispute resolution process established under the Contract Disputes Act, 41 U.S.C. § 601 *et* seq. Accordingly, significant aspects of these rules may be unenforceable, and the promulgation of the rules will create traps that may jeopardize rights of both government and contractors if they unwittingly fail to preserve their rights or fail to comply with these statutes.

A. The FAA's Limited Authority

In proposing these regulations, the FAA relies primarily on Congress' direction that the FAA develop and implement an "acquisition management system," which direction was contained in Section 348 of the FY 1996 Department of Transportation Appropriation Act. Pub. L. 104-50. 109 Stat. 436. 460 (1995). Secondarily, the FAA relies on the Air Traffic Management System Performance Improvement Act of 1996. Pub. L. 104-264, 110 Stat. 3213. 3227-50 (1996) which provided the FAA with a degree of autonomy from the Secretary of Transportation. These statutes. neither separately nor combined. provide the FAA with authority to divest the Court of Federal Claims and Boards of Contract Appeals of the jurisdiction provided under the Tucker Act and the CDA.

Section 348(b) expressly exempts the FAA's "acquisition management system" from seven listed statutes (or portions of statutes), and it further exempts the FAA from the Federal Acquisition Regulation and such other laws as provide authority to promulgate regulations in the FAR.[1] Neither the Tucker Act nor the

[1] Section 348(b) provides:

The following provisions of Federal Acquisition law shall not apply in the new acquisition management system developed and imptemented pursuant to Subsection (a):

(continued.. .)

CDA is listed in Section 348, and neither provides authority to promulgate regulations under the FAR. To the contrary, the jurisdiction under both statutes extends beyond federal contracts subject to the FAR.

Furthermore, an analysis of the language of Section 348 makes clear that Congress did not intend to provide the FAA a blanket exemption from the CDA or the Tucker Act. See Rand L. Allen, Christopher R. Yukins, "Bid Protest and Contract Disputes Under the FAA's New Procurement System" 26 Pub. Con. L.J. 135, 149-51 (1997). Under the basic legal principle *inclusio unius* est *exclusio alterius*, where – as here – a statute provides a list of specific exemptions, Congress is presumed to have intended only those exemption, and not any others. See *Tang v. Reno* 77 F.3d 1194 (9th Cir. 1996) (statute permitted the Attorney General to waive many, but not all. of the bases for exclusion under the immigration laws); *cf. Andres v. Glover Constr. Co.* 446 U.S. 608. 617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in absence of a contrary legislative intent'?.

Here, nothing in the legislative history suggests Congress meant to exempt the FAA procurements from Tucker Act or CDA jurisdiction. Nor is jurisdiction to resolve bid protests and disputes inconsistent with the Congressional mandate to create a new "acquisition management system." In fact, in subsequently extending Tucker Act jurisdiction to post-award protests in 1996[2], Congress did not exclude the FAA or otherwise alter the definition of "federal agency." The Court of Federal Claims has recently held that the Postal Service is a "federal agency" under the

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(...continued)

(1) Title III of the Federai Property and Administrative Services Act of 1949 (41 U.S.C. 252-266).
(2) The Office of Federal Procurement Police Act (41 U.S.C. 401 et *seq.*)
(3) The Federal Acquisition streamlining Act of 1994 (Pubic Law 103-355).
(4) The Small Business Act (15 U.S.C. 631 et *seq.),* except that all reasonable opportunities to be awarded contract shall be provided to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.
(5) The Competition In Contracting Act.
(6) Subchapter V of Chapter 35 of Title 31. relating to the procurement protest system.
(7) The Brooks Automatic Data Processing Act (40 U.S.C. 759).
(8) The Federal Acquisition Regulation and any laws not listed in (a) through (e) of this section providing authority to promulgate regulations in the Federal Acquisition Regulation.

See Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320. 110 Stat. 3870, 3874-75, § 12 (1996).

Tucker Act even though it is exempted from any "Federal law dealing with public or Federal contracts." Hewlett-Packard Co. v. United States, 41 Fed. Cl. 99 (1998). The more limited list of exemptions to procurement related statutes provided the FAA by Section 348(b) simply do not provide a basis for eliminating the bid protest and contract claim jurisdiction provided under the Tucker Act and CDA.

Nor do the amendments to 49 U.S.C. § 106 enhance the FAA's claim to an exemption from the CDA and the Tucker Act. Specifically, the FAA relies on the modification to 49 U.S.C. § 106(f) which provides the Administrator with "final authority" over "the acquisition and maintenance of property and equipment of the administration . . ." The purpose of this amendment and the other changes to § 106 was to carve out from the Secretary of the Department of Transportation ("DOT") certain specified functions over which the Administrator would have "final authority," i.e., independence from DOT. Nothing in the statute suggested that the FAA was no longer a "federal agency" or "executive agency" subject to the Tucker Act and CDA.

B. Impact on Bid Protests

In light of the FAA's exemption from GAO review of its procurement award decisions, the Section agrees that the FAA should maintain an agency level bid protest procedure to ensure adequate and impartial review of FAA award decisions. As discussed more fully below, with some modest tinkering, the proposed rules should provide an effective process for resolving most protests related to FAA procurements. The Section does not believe that the FAA has authority to compel offerors or potential offerors or bidders to waive their statutory right to judicial review in appropriate cases.

Nor. as a matter of policy, should the FAA seek – through its regulations – to foster the perception that Tucker Act jurisdiction is unavailable to review bid protests. First, such regulations are likely to mislead the less sophisticated bidders and offerors who may not appreciate the availability of Tucker Act and Little Tucker Act jurisdiction. In addition. the proposed regulations are likely to generate litigation over the extent of the FAA's authority, which litigation is most likely to occur – and disrupt – a major competitive procurement.

Accordingly, the Section recommends that the proposed regulations be changed to make clear that the protest related provisions only apply to protests filed with the Office of Dispute Resolution for Acquisition ("ODRA").

C. Impact On The Efficient Resolution Of Disputes

The proposed regulations. if made final. would have a much more serious and detrimental impact on the resolution of disputes. First. the regulations place contractors (and indeed the government) in legal jeopardy if their contract claims do not conform to the CDA requirements. Second. FAA's proposal would eliminate a major reform of the CDA – permitting direct, de *novo*, review of contract disputes.

The proposed rules create a significant risk for contractors (and the FAA contracting officers) that they will not take the steps necessary to perfect jurisdiction under the CDA over disputed contract claims. Obviously, this result is not a problem if the FAA is correct in its interpretation of its authority to create an "acquisition management system." but as discussed above. there is significant doubt as to that conclusion. If the FAA is wrong, neither the FAA's standard Disputes clause (§ 3.9.1-l) nor these regulations will bar claims from being subject to the CDA requirements. The Federal Circuit has made clear that the government cannot, but standard clause or regulation, compel contractors to waive de *novo* review under the CDA. *Burnside-Ott Aviation Training Center v. Dalton,* 107 F.3d 854 (Fed. Cir. 1997). ('Thus, the CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction unless the contract provision otherwise depriving jurisdiction is itself a matter of statute primacy").

Here, as drafted, the proposed rules deliberately (apparently) avoid all of the jurisdictional elements of the CDA. There is no process for submitting a certified claim to the contracting officer. and there is no process for the contracting officer to issue a "final decision.' on a government or contractor claim. Where the "contract dispute" is settled or favorably decided under the proposed procedures. the failure of a contractor to comply with the CDA will not be an issue. On significant claims, however. prudent contractors must necessarily request a final decision and preserve their option to seek independent *de novo* review under the CDA. Indeed under the proposed rules. until the issue of jurisdiction is settled. there will likely be significant parallel. duplicative and wasteful litigation over specific contract claims.

Even if the FAA were correct in its interpretation. the Section would be very troubled by the limited access to judicial remedies proposed for contracts with the FAA. The proposed approach fails to provide a right of direct access to the courts as there is under the Contract Disputes Act. and the courts have only limited authority over the agency's findings and recommendations. In short. a contractor doing business with the FAA is not assured of full judicial consideration of the facts and law underlying its dispute with the agency.

The Section understands and supports the FAA's goal of reducing the complexity and cost of the disputes process, but believes that the elimination of full

judicial remedies is a step too far. In its "Principles for Resolving Controversies in Public Procurement." the Section recentlv endorsed the principle that "parties must have available adequate administrative and judicial processes and remedies that provide for the independent. impartial. efficient. and just resolution of controversies." The core objectives of the principles were to encourage expeditious and inexpensive resolution of disputes. "while preserving the parties' rights to the full range of legal process where necessary and appropriate." Thus, the unavailability of *full* judicial process for those who contract with the FAA – in instances in which a party believes such full process is necessary and appropriate – is inconsistent with these principles and, therefore, unsupported by the Section.

The Section also believes it is a significant step backward into the pre-CDA days when *all* government contractors lacked the right to full judicial consideration of their disputes. At that time. for disputes "arising under" a contract. contractors generally could appeal a contracting officer's decision only to the head of the agency or a designated board of contract appeals: the only claims that could be taken directly to the courts were "breach-of-contract" claims, for which the contract provided no administrative remedy. In addition, under the then-existing disputes process (as would be the case under the proposed regulations), the agency was essentially the final arbiter of all facts related to an appeal. as the reviewing court (i.e., the Court of Claims) had limited review authority.

Notably, before Congress revamped that system through the CDA, it created the Commission on Government Procurement, which extensively analyzed, inter *alia*, the legal and administrative remedies available in federal contracts. After considerable deliberation. the Commission expressly recommended that contractors be provided direct access to the courts. explaining its recommendation as follows:

> We conclude. however. that direct access to the courts should be restored to the contractor to assure it of a day in court. a fully judicialized. totally independent forum that historically has been the forum within which contract rights and duties have been adjudicated. The rationale of the Tucker Act. which ended to a great degree the doctrine of sovereign immunity, is that the Government acting as a buyer subjects itself to this judicial scrutiny when it enters the marketplace, and should not. in all cases be administratively the judge of its own mistakes. nor adjust with finality disputes to which it is a party. This recommendation does no more than reaffirm the intent of this statute. While most disputes will undoubtedly best be resolved in an administrative proceeding, the contractor should not be denied a full

> judicial hearing on a dispute it deems important enough to warrant the maximum due process available under our system. Direct access to courts guarantees that. at the option of the contractor, the remedial process may extend from the contracting officer to the courthouse on all aspects of a dispute.

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Volume 4, at 23 (December 1972).

The Section believes this rationale is as persuasive today as it was over 25 years ago when it led to the CDA, and as it was when the Tucker Act first became law. Absent clear Congressional intent to denv contractors the right to full legal process when contracting with the FAA. the Section cannot endorse such a significant departure from the law.

III. PROPOSED RULES OF GENERAL APPLICABILITY

The proposed rules include provisions and definitions that are applicable to both protests and disputes as well as many that are specific to one or the other process. The comments in this section address those provisions that are equally applicable to both protests and disputes. Provisions, such as the "default adjudicative procedure," which present different concerns in the protest or disputes procedures are discussed separately in those sections.

A. Definitions – Section 17.3

1. Compensated Neutrai

The Section recommends that § 17.3 of the FAA's proposed rules be revised to provide:

> The parties pav equallv for the services of a Compensated Neutral. *unless otherwise agreed to by the parties.*

(Proposed change shown bv italics). The Section believes the rules should be flexible enough to afford the parties the latitude to negotiate allocation of the cost of a compensated neutral.

2. Discovery

As proposed, § 17.3(i) of the FAA's rules provides:

> Discovery in the Default Adjudicative Process is the procedure where opposing parties in a protest or contract dispute *may, when allowed.* obtain testimony from, or documents and information held by, other parties or non-parties.

63 Fed. Reg. 45383 (emphasis added)).

The Section recommends striking this definition, or at the very least, removing the language "may, when allowed." There is no need to define the term "discovery" and the nature and extent of discover-v varies in the bid protest and the disputes resolution arenas, but due process requires sufficient discovery in each case to permit a party to prove its case and challenge the other party's evidence.

3. Office of Disputes Resolution for Acquisition

In Section 17.3(n) of its proposed rules, the FAA provides a definition of **ODRA:**

> ODRA, under the direction of the Director, **acts** on **behalf** of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to the Administrator on matters concerning protests or contract disputes.

63 Fed. Reg. 45383.

In its present form. this rule is overbroad as it purports to vest in the Director the authority to recommend action on all protests and contract disputes. arguably including those protests and contract disputes before the Court of Federal Claims and the Federal District Courts pursuant to the Tucker Act. The Section recommends striking this definition. or in the alternative defining the ODRA solely in terms of its authority with respect to bid protests or disputes filed with it.

B. Filing and Computation of Time – Section 17.7

Section 17.7(b) of the FAA's proposed rules provides:

> Submissions to the ODRA after the initial filing of the protest or contract dispute may be accomplished by any means available in paragraph **(a)** of this section.

63 Fed. Reg. 45383. Paragraph (a) of Section 17.7 authorizes parties to file protests or contract disputes "by mail. overnight delivery, hand delivery, or by facsimile." Id. at (a).

Allowing parties to make submissions after the initial filing by mail is unworkable given the short time frames for resolving protests. The time sensitive nature of protests mandates that, after the initial filing of a protest complaint, overnight delivery, hand delivery, and facsimile are the only means of service permitted. Accordingly, the Section proposes the following language for Section 17.7(b):

> Submissions to the ODRA after the initial filing of a contract dispute may be accomplished by any means available in paragraph (a) of this section. Submissions to the ODRA after the initial filing of a protest may only be accomplished by overnight delivery, hand delivery or facsimile.

C. Protective Orders – Section 17.9

Section 17.9, as proposed provides:

> The terms of protective orders can be negotiated by the parties, subject to the approval of the ODRA. The protective order shall establish procedures for application for access to protected information. identification and safeguarding of that information. and submission of redacted copies of documents omitting protected information.

63 Fed. Reg. at 45384.

The Section supports the proposed rule to the extent that it permits the parties to negotiate the terms of protective orders. However. the Section is concerned that. without any limitation. the parties to a protest may agree to an order that does not adequately protect procurement sensitive or proprietary information of non-parties. Consequently, the Section recommends that the FAA develop a model protective order and associated applications for access by attorneys and consultants. that would contain the mandatory provisions needed to protect sensitive and non-purity proprietary information. The GAO Guide to GAO Protective Orders could provide a blueprint for the FAA guidelines concerning protective orders in bid protests.

D. Distribution of Decisions

Although the FAA generally provides public access to most of its decisions via the Internet (www.faa.gov/agc/casefile.htm), there is nothing in the proposed regulations as drafted that requires it to do so. The FAA's decisions have great value as precedent, particularly for counsel seeking to provide guidance to their clients. Accordingly, public access to agency decisions must be guaranteed in the text of the rules themselves.

With respect to bid protests, the Section proposes that the FAA adopt the language from the GAO's ruie regarding distribution of decisions. See 4 C.F.R. § 21.12. Specifically, the FAA should add a new rule, Section 17.37(n) that provides as follows:

> A copy of a decision containing protected information shall be provided only to the contracting agency and to individuals admitted to any protective order issued in the protest. A public version omitting the protected information shall be prepared wherever possible. If the decision does not contain any protected information. copies of the decision shall be provided to the Program Office, the protester(s), any intervenors and to the public.

With respect to decisions resolving contract disputes, the Section recommends §17.39(k) be modified as follows:

> A DRO or Special Master's findings and recommendations shall be submitted only to the Director of the ODRA and shall be released to the parties. *and* to the *public.* upon issuance of the final agency order for the contract disputes.

(Proposed change shown in italics).

E. Retroactivity

Proposed §17.1 states simply that these rules will apply to "all protests and contract disputes" with the FAA. The rule thus fails to address the issue of retroactivity, i.e.. whether it applies to contracts and disputes already in existence as of the effective date of the regulations. This omission is of particular concern in connection with the proposed regulations at §17.25(c), which purports to impose a time limitation for submission of "contract disputes." Current contractors will need to know whether or not these procedures apply to their current contracts.

Furthermore, a number of the provisions differ from the current clauses and guidance contained in the "Acquisition Management System," which will lead to confusion over what rules apply. Accordingly, the Section recommends that the proposed regulations expressly identify the contracts or SIRs to which the new regulations apply. Presumably, the protest procedures should apply only to SIRs issued after the effective date of the final regulation. Likewise, the contract disputes procedures (and particularly the time limits in § 17.25(c)) should apply only to contracts entered into after the effective date of the final regulations.

IV. RULES APPLICABLE TO AGENCY PROTESTS

A. Definitions - Section 17.3

1. Interested Party

The proposed rule in Section 17.3(k) defines interested party as follows:

> An interested party is designated as such at the discretion of the ODRA, and in the context of a bid protest is one who: (1) prior to the closing date for responding to a Screening Information Request (SIR), is an actual or prospective participant in the procurement, excluding prospective subcontractors; or (2) after the closing date for responding to a SIR, is (a) an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful. or (b) is an actual participant who is not nest in line for award under the SIR's selection criteria but who alleges specific improper actions or inaction's by the Program Office that caused the party to be other than next in line for award. Proposed subcontractors are not eligible to protest. The awardee of the contract may be allowed to participate in the protest as an intervenor.

63 Fed. Reg. at 45383.

This definition is far more complicated than the GAO definition with little apparent benefit, particularly because it creates an opportunity for mischief. For example, in the post award protest context, an interested party is "an actual participant who would be next in line for award under the SIR's selection criteria if the protest is successful." The use of the "next in line for award" standard creates a

number of problems. First, it requires the FAA to rank offerors rather than just select the awardee in all procurements. Second, it arguably permits the agency to undermine the protest process through contrived rankings. Third, it creates an ambiguity as to who is an interested party in the case of protests filed after the closing date for responding to a SIR but prior to award. For example. it is unclear under this definition whether an offeror that is excluded from competitive range prior to award can ever be an interested party.

In addition, this provision also addresses whether an awardee should be permitted to intervene. This issue is more appropriately addressed under the definition of "intervenor."

Accordingly, we recommend that the FAA modify Section 17.3(k) of its proposed rules to adopt the GAO standard for "interested party" which uses the "offeror with a direct economic interest'* standard instead of the proposed "next in line for award" ruie. To these ends, the Section suggests that the FAA strike proposed 17.3(k) and substitute in its place the following:

> (k) *An interested patty* is an actual or prospective participant in the procurement, excluding prospective subcontractors. whose direct economic interest would be affected by the award of a contract or the failure to award a contract.

2. Intervention

The Section 17.3(l) of the proposed rules provides:

> *An interuenor* is an interested party other than the protester whose participation in a protest is allowed by the ODRA.

This definition provides no criteria for the intervention determination other than the discretion of the ODRA. At a minimum. this rule should: (1) permit intervention as a matter of right in the case of awardees: and (2) establish a deadline for requests for intervention.

a. Standing to Intervene

Section 17.3(k) of the proposed rules provides that "[t]he awardee of the contract *nay* be allowed to participate in the protest as an intervenor." In post-award protests awardees should always be afforded the opportunity to intervene. Generally, an awardee's interest in defending the award is closely aligned with the agency's. Thus, an awardee is uniquely situated to assist the Program Office in

defending the award while simultaneously protecting its own interests. As a result, at least one Court has deemed the awardee and indispensable party in a bid protest. *B.K. Instrument, Inc.*, v. *U.S.*, 715 F.2d 713, 730-32 (2d Cir. 1983). Accordingly, the Section proposes that the FAA add the following to Section 17.3(l):

> The awardee of the contract *shall* be allowed to participate in the protest as an intervenor.

In addition, the proposed rule does not state whether a party may intervene on behalf of the protestor. If a potential party is not allowed to do so, then the only means for having two parties protest the same or similar issues is to require the filing of two separate protests. The ODRA would then face the issue of whether or not to consolidate the two protests. These are procedural steps that are simply unnecessary. It would be far more efficient and straightforward for the FAA to simply permit intervention on behalf of the protestor. Accordingly, the Section proposes that the FAA add the following to Section 17.3(l):

> An interested party may intervene on behalf of either the Program Office or the protestor.

b. Time to Intervene

The FAA should also amend Section 17.3(l) of its proposed rules by imposing a limit on the time for intervention. The rules as drafted contain no such limit, and therefore, permit parties to seek intervention at any phase of the protest. Without a time limit, offerors could use intervention as a tool for frustrating and interfering with the efforts of the FAA and protestors to resolve protests. particularly where the solution is adverse to the interests of prospective intervenors. Moreover. from a practical standpoint. early intervention is a necessary ingredient of expedited dispute resolution.

Specifically, we recommend that the FAA require that prospective intervenors request intervention by the end of the fifth day after the protest is filed. The Section suggests that the FAA add as the last sentence of Section 17.3(l) the following:

> Unless otherwise permitted by the ODRA after consultation with the parties, a prospective intervenor must request intervention before the end of the fifth (5) day the filing of the protest in order for such a request to be considered.

3. **Parties**

Section 17.3(n) of the FAA's proposed rules state:

> *Parties* include a protester or a contractor, the FAA, and any intervenor.

63 Fed. Reg. 45383 (proposed 14 C.F.R. § 17.3(o). As drafted. proposed Section 17.3(n) arguably restricts to one the number of protesters and intervenors that can be parties to a protest. It is entirely possible that more than one offeror may protest and/or more than one offeror may intervene, particularly in the case of protests of the terms of SIRs. Accordingly, we recommend that the FAA amend Section 17.3(n) of its rules to state as follows:

> *Parties* include the protester(s), the contractor. the FAA and any intervenor(s)

4. **Screening Information Request**

The FAA in Section 17.3(q) of its proposed rule provides that:

> ***Screening Information** Request (SIR)* means a request by the FAA for information concerning an approach to meeting a requirement established by the FAA.

63 Fed. Reg. 45383. As crafted, the proposed definition of a SIR is vague. and fails to convey the purpose for which SIRs are intended. Furthermore, it fails to clarify that the SIR must set forth the criteria by which offers are evaluated.

The Section recommends the following replacement language for Section 17.3(q):

> ***Screening Information** Request* (SIR) means a request by the FAA for information, including but not limited to documentation, presentations, proposals, or binding offers with the purpose of obtaining information which will ultimately allow the FAA to identify the offeror that provides the best value to the government, and to make a selection decision accordingly. The SIR shall also identify the criteria used to make the source selection decision.

This language is an adoption of the policy statement in § 3.2.2.3.1.2.1 of the FAA Acquisition Management System.

B. Matters Not Subject to Protest

Proposed Section 17.11 provides:

> The following matters may not be protested:
>
> (a) FAA purchases from or through federal, state, local and tribal governments and public authorities;
>
> (b) Grants:
>
> (c) Cooperative agreements;
>
> (d) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

63 Fed. Reg. 45384. As crafted, Section 17.11 is over broad because it purports to prohibit parties, regardless of the forum, from protesting the matters referred to in subsections (a) through (d). The FAA, however, lacks the authority to restrict the jurisdiction of the Court of Federal Claims and the Federal District Courts.

The FAA should narrow the scope of Section 17.11 so that protesters are only precluded from protesting before the ODRA the matters specified therein. Specifically, the ABA proposes that the FAA adopt the following language:

> The following matters cannot be protested before the ODRA:
>
> (a) FAA purchases from or through federal. state, local. and tribal governments and public authorities:
>
> (b) Grants:
>
> (c) Cooperative agreements:
>
> (d) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

C. **The General Protest** Process

1. **Commencement of Protest**

Section 17.13(d) of the FAA's proposed rules provides. in part:

> If a [status) conference is called, the parties will have five (5) business days after the status conference to inform the ODRA whether the parties agree to use ADR pursuant to Subpart D of this part: or to state why they cannot use ADR and must resort to the Default Adjudicative Process, pursuant to Subpart E of this part.

63 Fed. Reg. 45384 (emphasis added)). This rule. as proposed, suggests that parties can only resort to the Default Adjudicative Process where they cannot use ADR. Section 17.17(d)(2) of the proposed rules suffers from the same shortcoming.

The FAA's rules shouid provide parties with more flexibilitv to utilize the Default Adjudicative Process. For example, in the absence of a s&pension. a protestor may want to proceed to the merits of its protest as quickly as possible before their position is substantially undermined by contract award or performance. Accordingly, the Section proposes that the parties need only state why they will not use ADR, and suggests that Section 17.13(d) be reworded to state:

> If a [status) conference is called, the parties will have five (5) business davs. . . to state why they will not use ADR and m&t resort to the Default Adjudicative Process. pursuant to Subpart E of this part.

For the same reasons. the ABA proposes that the FAA replace the word "cannot" in the second line of Section 17.17(d)(2) with "will not."

2. Suspension

The FAA's proposed rules include a presumption against suspension of a procurement or contract performance during a bid protest. In this regard. the proposed regulations state as follows:

> (g) Procurement activities. and. where applicable, contractor performance pending resolution of a protest shall continue during the pendency of a protest. unless there is compelling reason to suspend or delay all or part of the procurement activities. Pursuant to §§ 17.15(d) and 17.17(b), the ODRA mav recommend suspension of contract performance for a compelling reason. A decision to

> suspend or delay procurement activities or contractor performance would be made in writing by the FAA Administrator or the Administrator's delegee for that purpose.

63 Fed. Reg. 45384. The rules further handicap the protestor by requiring it to put forth its entire suspension case with the submission of its protest complaint:

> (d) If the protester wishes to request a suspension or delay of the procurement and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement because of the protested action. the protester shall:
>
> (1) Set forth each such compelling reason, supply all facts supporting the protester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.
>
> (2) Clearly identify any adverse consequences to the protester, the FAA, or any interested party, should the FAA not suspend or delay the procurement.

63 Fed. Reg. 45385. The Program Office is then given an opportunity to rebut the protestor's suspension arguments: however. the rules do not afford the protestor the opportunity to respond to the Program Office arguments:

> (b) If the protester requests a suspension or delay of procurement pursuant to §17.15(d), the Program Office shall submit a response to the request to the ODRA within two (2) business davs of receipt of the protest. The ODRA. in its discretion. may recommend such suspension or delay to the Administrator or the Administrator's designee.

63 Fed. Reg. 45385.

The presumption against suspension during a bid protest compromises the perception that the FAA's protest procedures are effective and fair. In order to be fair and effective. the protest process must provide the prospect of a realistic remedy. Often. where an awardee is permitted to proceed with performance. even if

the protestor prevails in demonstrating the award was improper. the protest forum will not require the termination of the illegally awarded contract because of the adverse impact on the agency. In fact. the proposed rules expressly provide that the ODRA should consider, among other things, "the extent of performance completed" in making its award determination. *63* Fed. Reg. 15386.

This problem is exacerbated bv the fact that: (i) the protester bears the burden of demonstrating that a compelling reason exists for suspension; (ii) the protestor must set forth its entire suspension case with its protest complaint; (iii) the Program Office is allowed to respond to the protestor's arguments but the protester is not allowed an opportunity to reply to the Program Office's position against suspension: (iv) the suspension decision is unnecessarily elevated to the level of the Administrator or his delegee: (v) the suspension decision is not subject to judicial review. In light of the expedited schedule for resolution of bid protests – through either Alternate Disputes Resolution (20 days) or the Default Adjudicative Process (30 days) – the substantial presumption against suspension is both unnecessary to protect the FAA's interests and unfair to protesters.

The FAA should consider reversing this presumption against suspension. However, at a minimum, if such a reversal is not feasible. the FAA should drop the regulatory presumption altogether and have the ODRA decide whether or not a presumption is warranted on a protest by protest basis. If the protestor makes the more compelling case, the suspension would be entered. If the Program Office is able to demonstrate exigencies which require the procurement or contract performance to proceed, the request would be denied. Such an approach would permit the ODRA to assure that the acquisition management process remains timely and cost effective. while at the same time. protecting the protest process.

The rules should also permit the ODRA to tailor the suspension to the specific exigencies of the protest by providing for consideration of limited or partial suspensions. Furthermore. the rule should allow the Program Office to avoid the suspension issue altogether by stipulating that the continuation of the procurement or performance would not be considered for the purposes of deciding a remedy in the event that the protestor prevailed. See. *e.g., Candle Corp. v. United* States. 40 Fed. Cl. *658* (1998).

Furthermore. these proposed regulations should be revised to correct the additional procedural handicaps imposed on the protestors seeking suspensions. The protestor should not be required to present its entire suspension case in its initial protest. The protestor should only be required to request a suspension in its protest and then afforded the opportunity respond in writing to the agency's position before a suspension decision is made. This would provide the ODRA with a

more complete understanding of the merits of each party's position regarding suspension, and allow for a more fair adjudication of the suspension issue.

Finally, the proposed § 17.13(g) requires that any suspension decision must be made "in writing by the FAA Administrator or the Administrator's delegee for that purpose." 63 Fed. Reg. 45384. There is no reason to elevate the suspension decision to that level and, in fact, a number of compelling reasons not to. First, requiring the Administrator or his or her delegee to make the suspension decision will unnecessarily delay this determination to the detriment of all involved. Second, such an approach tends to further undermine the integrity of the process. The Administrator or his or her delegee is more likely to make this suspension determination based on factors other than the merits of the suspension submissions. Third, the ODRA is likely to be better qualified, based on its depth and breadth of experience with protests generally, and better informed with regard to the specific protest at issue to make this determination.

To address these issues we recommend the following changes to the proposed rules. First. proposed Section 17.13(g) should be amended as follows:

> Pursuant to §§ 17.15(d) and 17.17(b), the ODRA shall decide on a protest by protest basis whether a suspension or delay of procurement activities, and, where applicable, contractor performance pending resolution of a protest is warranted. The ODRA may consider, among other options. a limited or partial suspension. The ODRA shall not direct the suspension of procurement activities or contract performance if the Program Office stipulates that the continuation of such procurement activities or contract performance shall not be a factor in the determination of the remedy in the event the protest is granted.

Second. the proposed Section 17.15(d) should be amended as follows:

> (d) If the protester wishes to request a suspension or delay of the procurement. it must include that request in its protest complaint.

Third, the proposed Section 17.17(b) should be amended as follows:

> (b) If the protester requests a suspension or delay of procurement pursuant to § 17.15(d), the Program Office shall submit a response to the request to the

> **ODRA** within two (2) business days of receipt of the protest. If the Program Office opposes the suspension, the ODRA shall afford the protestor the opportunity to review and respond to any Program Office response prior to the ODRA suspension determination. Based on a balancing of the equities presented, the ODRA shall decide whether a suspension or delay is warranted on a protest by protest basis.

3. Program Office Report

Section 17.17(f) of the FAA's proposed rules provides:

> Should the parties indicate at the status conference that ADR will not be used, then within ten (10) business days following the status conference, the Program Office will file with the ODRA a Program Office response to the protest. The Program Office response shall consist of a statement of pertinent facts. applicable legal or other defenses, and shall be accompanied by all documents deemed relevant by the Program Office, position. A copy of the response shall be furnished to the protester at the same time. and by the same means. as it is filed with the ODRA. At that point the protest will proceed under the Defauit Adjudicative Process pursuant to § 17.37.

63 Fed. Reg. 45385.

As an initial matter. rather than providing an objective standard for the identification of documents to be produced by the Program Office, this proposed rule. as worded. only requires the Program Office to produce "all documents deemed relevant by the Program Office." Thus it is the Program Office's unilateral subjective determination which defines the scope of its document production obligation under this rule. The Section recommends that rule simply state the objective standard, i.e.. relevance, and let the ODRA assess whether the Program Office has complied with that standard in making its document production determinations.

In this regard. the proposed rules provide no procedure for the protestor or the ODRA to assess the adequacy of the Program Office initial determination as to what documents are relevant and therefore must be included with its response to

the protest. Historically, disputes over which documents are relevant to the protest and therefore must be produced have contributed to delay in getting to the merits of a protest. It was for this reason that the GAO added a process to allow for early resolution of such document disputes prior to the submission of the agency report. 4 C.F.R. § 21.3(c). In order to avoid similar problems in this forum, the Section recommends that the rules provide for early identification of the documents to be produced by the Program Office so that any objections can be addressed before the Program Office files its response.

Further, although the proposed rule directs the Program Office to prepare a response in the event that the parties elect to forgo the ADR process, it does not provide for a Program Office response if the ADR process is unsuccessfully pursued. In either case, the proceeding would be shifting to the Default Adjudication Process, and therefore a Program Office response to the protest would have to be filed.

To address these issues (and an apparent misprint in the proposed rule), the Section would redraft § 17.17(f) as follows:

> (f) Should the parties indicate at the status conference that ADR will not be used or the ADR process concludes without resolution of the protest, then within five (5) business days following the status conference or the conclusion of the ADR process, the Program Office will file with the ODRA a list of the relevant documents that it will produce. Within ten (10) business days following the status conference or the conclusion of the ADR process, the Program Office will file with the ODRA its response to the protest. The Program Office response shall consist of a statement of pertinent facts, applicable legal or other defenses, and shall be accompanied by all documents relevant to the protest allegations or the Program Office defenses. A copy of the list of relevant documents and the Program Office response shall be furnished to the protester at the same time. and by the same means, as it is filed with the ODRA. At that point the pmtest will proceed under the Default Adjudicative Process pursuant to § 17.37.

4. **Dismissal or Summary Decision of Protests – Opportunity to Respond**

Section 17.19(c) of the FAA's proposed rules provides that the ODRA, "[e]ither upon motion by a party or on its own initiative" may enter a dismissal or a summary decision. 63 Fed. Reg. 45385. The rules as crafted, however, fail to provide the party against whom the dismissal or summary decision may be entered with an opportunity to respond.

Such a response is crucial to providing the adjudicator with a more complete understanding of the material facts; specifically, whether there are any material facts in dispute. Accordingly, the Section proposes that the FAA add a new 517.19(e) which provides as follows:

> Prior to entering either a dismissal or a summary decision either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.

D. Default Adjudicative Procedure – Protests

1. Discovery

The FAA's proposed default adjudicative procedures permit the DRO or Special Master to authorize discovery. In this regard, the proposed regulation §17.37(f) states as follows:

> Discovery may be permitted within the discretion of the DRO or Special Master. The DRO or Special Master shall manage the ciiscovery process. including limiting its length and availability, and shall establish schedules and deadlines for discovery consistent with time frames established in this part.

63 Fed. Reg. 45387. Noticeably absent from this proposed rule is any guidance on what standard should be employed by the DRO or Special Master when considering the necessity for and scope of discovery in protests. Moreover, the rule is silent regarding the type of information that is discoverable and who can seek discovery from whom. Without this guidance, the rule lacks predictability as to the procedure and methodology of the discovery process.

The Section proposes that the FAA reword Section 17.37(f) of the proposed rules to state as follows:

> The DRO or Special Master shall permit the parties to obtain discovery from each other, and if justified. from non-parties. of all information relevant to the allegations of the protest. At a minimum, the parties shall exchange, in an expedited manner, all relevant, non-privileged documents. Where justified by a party, the DRO or Special Master may authorize additional written discovery and/or deposition testimony. The DRO or Special Master shall establish schedules and deadlines for discovery consistent with time frames established in this part.

2. Comments on Program Office Report

As discussed above. Section 17.17(f) of the FAA's proposed rules provide that. if the ADR option is not used. the Program Office shall submit a response to the protest to include "a statement of pertinent facts, applicable legal or other defenses, and shall be accompanied by all documents deemed relevant by the Program Office." 63 Fed. Reg. 45385. Although the proposed rules state that protesters "shall be furnished" with a copy of the Program Office response, the rules neglect to provide protestors, or for that matter all interested parties, an opportunity to comment on the response.

Protestors must have the opportunity to respond on the record to the positions taken by the Program Office and the documents produced by the parties. The comments of protestors are crucial to providing the adjudicator with a more complete understanding of the merits of each party's position. and allowing for a more informed and therefore fairer disposition of the protest. The FAA should amend its proposed rules to afford protestors and intervenors the opportunity to submit comments on the Program Office report. The rules should also permit the parties to supplement the record to address new information relevant to the protest grounds is developed through discovery or in the course of a hearing.

The Section proposes that the FAA adopt language similar to that employed by the GAO in its rule governing comments on the agency report. See 4 C.F.R. § 21.3(h)(i). Specifically, the FAA should insert as a separate section after proposed Section 17.37(f) the following:

> Protesters and Intervenors shall file comments on the Program Office response with DRO or Special Master within 10 calendar days after receipt of the report, with a copy provided to the other

> participating parties. The protest shall be dismissed unless the protester files comments or a written statement requesting that the case be decided on the existing record, or requests an extension of time within the 10-day period. Upon a showing that the specific circumstances of a protest require a period longer than 10 days for submission of comments, DRO or Special Master will set a new date for the submission of comments. Extensions will be granted on a case-by-case basis. If the factual record is supplemented either through discovery or as a result of a hearing, the DRO or Special Master shall permit all of the parties to supplement their comments to address these additional facts.

3. **Hearings**

The proposed rule at Section 17.37(g) states that:

> The Special Master or DRO may request or permit oral presentations, and may limit the presentations to specific witnesses and/or issues.

The proposed rules employ the term "oral presentation" which does not distinguish between hearings and oral argument. Furthermore. proposed Section 17.37(g) provides no guidance as to when an evidentiary hearing is appropriate or what procedures shall be used. The section recommends the hollowing replacement language for Section 17.37(g):

> (g) At the request of a party or on his or her own initiative the Special Master or DRO may authorize a hearing or oral argument.
>
> (1) A hearing may be conducted if there is a material fact at issue that cannot be resolved without oral examination. or an issue as to a witness's credibility, or an issue which is so complex that proceedings with supplemental written submissions would be less efficient and more burdensome than developing a record through a hearing. If a hearing is to be conducted. the Special Master or DRO shall conduct a prehearing conference to discuss and resolve matters such as

> the procedures to be followed, the issues to be considered. and the witnesses who will testify. After the conclusion of the hearing, the Special Master or DRO shall permit the parties to file post-hearing comments.
>
> (2) Unless the DRO or Special Master decides otherwise, oral argument should be permitted where no hearing is to be conducted. Oral argument shall be conducted only after the submission of all written comments or other submissions. Prior to oral argument, the DRO or Special Master shall conduct a conference to discuss and resolve matters such as the procedures to be followed and the issues to be discussed.

This proposed rule generally adopts the GAO standards and procedures for hearings. 4 C.F.R. § 21.7; Town Development, *Inc*, B-257585, 94-2 C.P.D. ¶ 155.

4. **Commencement of Default Adjudicative Process**

Proposed Section 17.37(a)(2) provides:

> The Default Adjudicative Process for protests will commence on the *latter of:*
>
> * * *
>
> (2) The parties submission of joint written notification to the ODRA that the ADR process has not resolved all outstanding issues. or that the twenty (20) business-day period allotted for ADR for protests has either expired or will expire with no reasonable probability of the parties achieving a resolution.

63 Fed. Reg. 45387 (emphasis added).

This rule creates a significant disincentive for anv protestor to elect to proceed with the ADR process. If the parties agree to participation in the ADR process. then, under this rule. the Default Adjudicative Process cannot start for at least 20 business-davs. Given the FAA's current preference against suspensions. a protestor can generally not wait for four weeks after award to begin pursuing the

merits of its protest without materially impairing his chances for a meaningful remedy.

Furthermore. even if the four week minimum is a result of a drafting error, and the FAA had actually intended for the Default Adjudicative Process to be triggered by the earliier of the "[t]he parties submission of joint written notification" or the expiration of the 20 business-day period allotted for ADR, this intended rule is still problematic. The requirement for a joint notification would still permit one party keep the matter hostage in the ADR process for the entire four weeks by refusing to agree to the joint notification.

For this ADR process to be effective, both the protestor(s) and the Program Office must be permitted to retain the option of triggering the Default Adjudicative Process at any time during the ADR process.

Finally, since the agency must first file a Program Office response to the protest to begin the Default Adjudicative Process, regardless of whether the ADR process is pursued, we recommend that the filing of this response serve as the common demarcation for the Default Adjudicative Process.

In this regard. we propose changing Section 17.37(a) as follows:

> (a) The Default Adjudicative Process for protests will commence upon submission of the Program Office response to the ODRA pursuant to §17.17(f), with ten (10) business days following either:
>
> (1) the status conference held pursuant to § 17.17(c) if the parties decide not to use the ADR process: or
>
> (2) the earlier of: (i) the submission of written notification to the ODRA by either the protestor or the Program Office that the ADR process has not and likely will not resolve all outstanding issues. or (ii) the expiration of the period allotted for ADR pursuant to §17.13, if the parties decide to use the ADR process.

V. RULES APPLICABLE TO DISPUTES

In evaluating FAA's proposed regulations governing the disputes process, the Section has been guided bv two principles. First, the Section believes that the rules governing dispute resolution should be fair and consistent with the requirements of

due process, and should apply to the same extent and in the same manner to both contractor and government claims. Second. the Section believes that the rules should seek to promote clarity and predictability, and to minimize time-consuming, expensive litigation of procedural issues by setting forth the requirements imposed on the parties as clearly and unambiguously as possible.

A. Definitions -- Section 17.3

These portion of the comments address the definitions that are applicable predominately or solely to the resolution of disputes under the proposed regulations.

1. Use of the Term "Contract Dispute"

Throughout Section 17 of these proposed regulations. the FAA uses the term "contract dispute" to refer to both (i) matters that are clearly in dispute between the government and a contractor. and also to (ii) matters that may not yet have ripened into a dispute but which, under regulations applicable to all other federal government contracts, are deemed to be "claims." For example, at §17.31, the proposed regulation states that the ODRA "shall encourage the parties to utilize ADR as their primary means to resolve protests and contract disputes." In this context, the term "contract dispute" apparently refers to a matter which the parties have not yet been able to resolve, and which is actually in dispute. However, in §17.25(c), the proposed regulation states that "a contract dispute against the FAA shall be filed with the ODRA within six months of the accrual of the contract dispute. . . . " In this context, the term "contract dispute" appears to refer to a claim which may or may not be disputed.3

It appears that FAA has proposed to use the term "contract dispute" rather than '*contract claim" in any effort to distance itself from the mandatory "claim" submission requirements of the CDA. In doing so. however, it has chosen to reintroduce and emphasize the very word that led to substantial and wasteful litigation of over whether a matter was in "dispute". A line of decisions beginning with *Dawco Construction, Inc. v. United States,* 930 F.2d 872 (Fed. Cir. 1991) held that in order to constitute a "claim" for jurisdictional purposes under the CDA, there had to be a pre-existing dispute between the parties. *Dawco* resulted in protracted, vexatious litigation for four years. until it was overruled by an *en banc* decision of the Federal Circuit in *Reflectone v. Dalton,* 60 F.3d 1572 (1995).

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3 This interpretation is bolstered by the definition found to refer to a claim which may or may not be disputed. at § 17.3 (g) , which closely follows the definition of "claim" found in the Federal Acquisition Regulation ("FAR") at 48 CFR 933.201. For purposes of the FAR. a "claim" need not be in dispute when it is submitted.

To avoid a repetition of the wasteful litigation engendered by *Dawco,* the Section believes that a more effective remedy for the problem would be to:

- create a new definition of "contract dispute", and
- define "contract claim" using a slight modification of the current definition of "contract dispute."

Accordingly, the Section recommends: (1) that the term "contract dispute" be changed to "contract claim" in the sections of the proposed regulation which are set out in the footnote"; (2) that a new term ("contract dispute") be added to the listing of definitions in $17.3; and (3) that the term "contract dispute" in §17.3 be referred to as "contract claim" and its definition amended as follows:

> *Contract* claim. as used in this part. means a written request to the ODRA seeking as a matter of right, the payment of money in **a** sum certain. the adjustment or interpretation of contract terms, or other relief arising under, relating to, or involving an alleged breach of contract, entered into pursuant to the AMS. A contract claim need not be in dispute when it is filed in accordance with §17.25.
>
> *Contract dispute* means a contract claim that the parties are unable to resolve informally prior to submission of their joint statement as required by §17.27(a).

2. "Accrual" of a Contract Dispute

The proposed regulations. §17.3(a) and (b), contain the following two definitions, which relate to the proposed limitations period for submission of claims:

> *Accrual* means to come into existence as a legally enforceable claim.

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4 The term "claim" should be substituted for the term dispute" in the following sections of the proposed regulation: 17.1; 17.3(b); 17.3(g); 17.3(h): **17.3(n); 17.3(p); 17.7(a); 17.7(b);** 17/23(a); **17.23(b); 17.23(c); 17/23(c)(1); 17.23(c)(2);** 17.23(d); 17.25 (heading); 17.25(a); 17.25(a)(3); **17.25(a)(4);** 17.25(b); 17.25(c); 17.27(a); 17.29(a); 17.29(b); 17.29(c); 17.29)d).

> *Accrual* of a contract dispute occurs on the date when all events underlying the dispute were known or should have been known.

This particular phraseology is new; to the best of the Section's knowledge, it does not appear in any other federal regulations or statutes of limitations, and it has not been judicially developed in the federal courts. Precisely because it is new and undeveloped, the Section believes that this definition is likely to lead to confusion and litigation over a period of years while contractors, the government and the courts struggle to explicate its meaning.

Consistent with the goal of maximizing clarity and predictability, and minimizing litigation over procedural issues, the Section thus recommends that the FAA adopt a definition of accrual of a contract dispute [claim]" that follows the test developed by the Court of Federal Claims under the Tucker Act for accrual of contract claims against the United States; or, at a minimum. that the FAA adopt the definition of accrual that has been incorporated into the Federal Acquisition Regulation.

a. The FAA's Proposed Definition Is Unnecessarily Imprecise

The FAA's definition of '*accrual of a contract dispute" creates not one, but two ambiguities' and thus two areas for potential disagreement. First, "accrual" is defined in referenced to "all events underlying the dispute" without further elaboration or explication. The term is not defined, and there is no history or body of case law to assist in interpreting it. As more fully explained below. the Tucker Act/Court of Federal Claims definition (as well as the FAR definition) illustrate and circumscribe the term "event." limiting it to those occurrences that "fix the liability" of the party in question and "entitle the claimant to institute an action." The Section believes that the added specificity provided by this judicial gloss on the meaning of "accrual" test is desirable. and its use here would avoid some of the imprecision of the term "underlying events".

Second, the FAA definition does not tie the trigger date to the occurrence of the relevant events. Instead. the trigger date for the limitations period is keyed to when someone -- undefined in the proposed definition -- "knew or should have known" about the events. Thus even if the parties could agree on what the "underlying events" were, they would then be required to agree on when someone "knew or should have known.' of those events. The Section believes that this adds an unnecessary layer of uncertainty, and will likely result in substantial disagreement as to when someone "knew or should have known" about" all underlying events." These difficulties would be avoided by use of a definition drawn

from judicial development of the Tucker Act "all events" test, as further explained below.

b. The Tucker Act "All Events" Test

Under the Tucker Act, 28 U.S.C. §1491, the Court of Federal Claims formerly the Court of Claims) has jurisdiction over contract claims against the United States. Such claims are generally subject to the six-year statute of limitations at 28 U.S.C. §2501. Pursuant to the "all events" test which is typically applied to determine the commencement of this six-year time period, a claim first accrues and the statute of limitations begins to run "when all the events have occurred to fix the liability of the government and entitle the claimant to institute an action." *Japanese War Notes Claimants Association v. United States.* 373 F.2d 356 (Ct. Cl. 1966), *cert. denied,* 389 U.S. 971 (1967); *see also. Catawba Indian Tribe v. United States.* 982 F.2d 1564. 1570 (Fed.Cir.), *cert. denied.* ___ *U.S.* , 113 S. Ct. 2995 (1993); *Chevron U.S.A. v. United States,* 923 F.2d 830. 834 (Fed.Cir.), *cert. denied,* ___ U.S. , 112 S.Ct. 167 (1991)(cause of action accrues when all events necessary to state a claim have occurred).

The "all events" test is well understood and has been applied in contract disputes with the United States government for more than 40 years. While it is does not eliminate all disagreement about when the limitation period begins to run, judicial development has narrowed the potential areas of dispute, and the existing case law provides an extensive source of guidance as to its applicability in various factual scenarios. Accordingly, the Section recommends adoption of this "all events" test to define when a contract claim involving the FAA "accrues."

This recommendation does have one potential shortcoming. The "all events" test was developed by the Court of Claims (and applied by its successor courts) at a time when the jurisdiction of that court was limited to claims for monetary damages. Accordingly, in order for a claimant to institute an action. the plaintiff had to have incurred some monetary damages.[5] The FAA's proposed definition of "contract dispute." however, includes not only requests for the payment of money but also requests for "adjustment or interpretation of contract terms. or other relief." Thus under the FAA regulations a dispute need not involve money damages; but the Tucker Act "all events" test as developed by the courts does not directly address those situations.

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5 Under the Tucker Act. the law was not entirely clear whether a cause of action accrued only after all damages had been incurred. or whether it accrued once any monetary damage was ascertainable. *Compare. Terteling v. United States.* 167 Ct. Cl. 331 (1964) with *Chipps v.* United States, 19 Cl. Ct. 201. 205(1990).

In order to accommodate this issue, the Section recommends that the definition of accrual include a requirement that some injury have occurred regardless of whether monetary damages have been incurred. To eliminate the need for any injury at all as a prerequisite to submitting a claim would create ripeness issues and encourage assertion of claims/disputes while the harm remained only threatened or theoretical.6 For example, many non-monetary claims result because the contracting officer has couched some contract direction or termination in the form of a final decision. See, e.g., Bell Helicopter Textron, ASBCA No. 35950,882 BCA ¶ 20,656 (unilateral price determination). If accrual of non-monetary claims were to occur as soon as such claims were ripe, needless protective appeals would be likely to result. On the other hand, to require all damages to be incurred before a claim accrued would, in many cases. unnecessarily prolong the limitations period.

The intermediate approach recommended bv the Section would avoid both these problems and is consistent with federal practice generally. See, *Lowy v. Bay* Terrace *Cooperative,* 698 F.Supp. 1058, 1065 (E.D.N.Y. 1988), *aff'd* 869 F.2d 173 (2d Cir. 1989)(declaratory judgment claim did not accrue at time Co-op's resale policy was enacted, but rather when policy was applied to plaintiff's attempt to sell co-op). It is also consistent with the dictionary definition of "event", which makes clear that the term contemplates both cause and effect.7 A non-monetary claim would not accrue (and thus would not need to be filed with the ODRA until a direct harm resulted from the offending action. A monetary claim would accrue when the damages could reasonably be estimated. thus permitting assertion of a claim for "payment of money in a sum certain" as required by FAA's proposed definition of "contract dispute".

The Section thus recommends the following definition:

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6 Whether a non-monetary claim is ripe generally requires a balancing between the need for present adjudication and the hardship of withholding judicial intervention. See. Charles A. Wright. Arthur R. Miller & Edwin H. Cooper. *Fed. Prac. & Proc. Juris. 2d* § 3532. "Ripeness" (1984) . For a claim to be ripe, the petitioner must be suffering from an "onerous legal uncertainty." *Continental Airlines v. CAB.* 522 F.2d 107. 128 (D.C. Cir. 1975). A claim may be ripe where there is a "realistic danger of sustaining direct injury." *Mass. Buy Transp. Authority v. United States,* 31 Cl. Ct. 352. 258 (1990).

7 The Black's Law Dictionary definition of "event" states: The consequence of anything; the issue of outcome of an action as finally determined: that in which an action. operation. or series of operations. terminates. Noteworthy happening of occurrence. Something that happens.

> *Accrual* of *a contract claim* means that all events have occurred which fix the liability of either the government or the contractor and permit assertion of the claim. regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a clam or the running of the limitations period may be tolled on such equitable grounds as where there has been active concealment of fraud or where the facts were inherently unknowable.

As noted above. the principal advantage of using this test lies in its well-established and well-understood meaning within the jurisprudence of federal contract claims. Its use by the FAA would maximize clarity and predictability, and minimize unnecessary procedural litigation.

c. The FAR Definition of Accrual

One alternative to adopting the Tucker Act "all-events" test would be for the FAA to adopt the definition of 'accrual" that has been included in the Federal Acquisition Regulation (FAR 33.201) since 1995. That definition states:

> Accrual of a claim occurs on the date when all events. which fis the alleged liability of either the Government or the contractor and permit assertion of the claim. were known or should have been known. For liability to be fixed. some injury must have occurred. However. monetary damages need not have been incurred

This definition is a slight modification of the Tucker Act test, in that it substitutes the "known or should have been known" standard for determining the trigger date for the limitations period instead of the principle of equitable tolling. As explained above, the Section believes that this additional test adds an unnecessary layer of uncertainty, whereas a fixed accrual date subject to tolling is more consistent with commercial practice. See Uniform Commercial Code §§ *2-725* (2) and (4). Nonetheless: adoption of this definition bv the FAA would nevertheless be consistent with the FAR and would thus provide contractors who deal with both

the FAA and other agencies some consistency in the standards being applied to their claims?

B. The Contract Dispute Resolution Process – Section 17.23

The process outlined for resolving disputes appears unnecessarily cumbersome for what are intended to be streamlined procedures. Furthermore, the obligation to continue performance creates significant uncertainty where final decisions have been estimated.

1. Informal Resolution

Section 17.23 contemplates the filing of a "contract dispute*' with the ODRA followed by thirty (30) days in which the parties (a) "should seek" to resolve the matter informally and (b) must prepare a joint statement for filing under § 17.27. However, § 17.23(d) states that "the contractor and the CO may jointly request one extension" of the 30-day period for informal resolution, whereas § 17.27(a) states the "ODRA may extend this time for good cause."

The language of these two provisions creates unnecessary confusion concerning whether the joint request for an extension is a matter of right and whether the parties are really limited to one extension. Accordingly, the Section recommends the following change to § 17.23:

> **(d)** If informal resolution of the contract disputes appears probable. the ODRA shall. upon joint request of the CO and contractor. extend for an additional 30 days. the time for filing the joint statement under § 17.27.

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3 In this regard. the Section notes that during debate on the legislation which resulted in promulgation of these rules(Pub. L. No. 104-50, 9348. 109 Stat. 436 (1995)), a number of Congressmen expressed concern that allowing FAA to utilize a system that differs from the system used by other contractors and other agencies. would create unnecessary uncertainty and ambiguity.

Senator Cohen. for example. remarked that "If Congress acquiesces to these piecemeal approaches. the Federal Government will be plagued by conflicting and contradictory procurement laws . . . which will make it harder --not easier --to do business with the Government. Industry will have to learn literally hundreds of procurement systems." CONG. REC. S16361-62 (daily ed. Oct. 31. 1995). (Emphasis added.) The Section agrees that differing regulations for claims resolution will add complexity and inefficiency to the overall procurement system. and will particularly impact the many contractors who do business not only with the FAA. but with other agencies as well.

2. Continued Performance

Proposed §17.23(f) would require contractors to continue performance of their contracts pending resolution of any contract disputes:

> *(9* The FAA will require continued performance in accordance with the provisions of a contract, pending resolution of a contract dispute, arising under or related to that contract.

While this regulation is similar to regulations that have been in place for many years under the Contract Disputes Act, the Section has two recommendations that it believes will enhance the FAA's goals while protecting the legitimate interests of contractors.

a. FAA Should Clarify What Performance Must Be Continued Pending Resolution Of The Dispute

FAA's proposed regulations encourage informal resolution of claims and disputes, and do not require a contracting officer's final decision. As noted above, the Section endorses FAA's emphasis on informal resolution. However, since the proposed regulations would require continued performance of the contract pending resolution of a dispute (whether that is informal or formal), it is important for contractors to know what performance they must continue.

Many contract disputes involve disagreements over the scope or type of performance required by the contract. Without a final contracting officer's decision or some other written direction from the contracting officer. contractors may be unable to determine just what performance they must continue pending resolution of the dispute. In order to provide maximum clarity, the Section believes that §17.23(f) should be amended to read:

> (f) The FAA will require continued performance in accordance with the provisions of a contract *and* the *contracting officer's written directions,* pending resolution of a contract dispute. arising under or related to that contract.

b. FAA Shouid Consider Financing The Continued Performance Pending Resolution Of The Dispute

FAA's proposed regulation appear to require continued performance for claims and disputes that "arise under" the contract as well as those that "relate to" the contract.[9] Claims that "arise under" the contract are those which are based on one of the specific remedy-granting clauses that are included in the contract, such as the Changes clause. Claims that "relate to" a contract are generally claims for breach of the contract by the other party, where the remedy is established by common law. As noted in FAR 33.213(a), prior to passage of the Contract Disputes Act of 1978, 41 U.S.C. §601 *et* seq., contractors were not required to continue performance when their claims "related to" the contract, i.e., when they alleged a breach by the Government. Since passage of that Act, agencies have been permitted to require continued performance even when the Government is in breach, provided that this requirement is specifically authorized in accordance with Agency procedures.[10]

When such authorization occurs. however. the FAR suggests that agencies should consider financing the continued performance pending outcome of the dispute:

> (b) In all contracts that [require continued performance even where there is a breach by the Government] . . . . the contracting officer shall consider providing, through appropriate agency pmcedures, financing of the continued performance: provided. that the Government's interest is secured.

FAR 33.213(b). This provision strikes a balance between the risks to the contractor and the risks to the Government. and is particularly important where the parties are unable to settle their disputes early.

The FAA's provision would impose a blanket requirement on contractors to continue performance despite the Government's breach of the contract. in any and all circumstances: and no provision is made for financing the work pending resolution. Faced with this requirement. the Section believes that contractors are likely to include contingent factors in their pricing proposals for all FAA contracts,

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9 There is some ambiguity in this regard in that the definition of "contract dispute" encompasses breach claims. but §17.33(a) addresses "contract disputes arising under contracts . . ."

10 Those agencies which have. in fact. authorized this requirement have done so only in limited circumstances. primarily where national security or public health are invoived. *Compare*, e.g., FAR 33.213 and 52.233-l(i) with DFAR 233.215 and NFS 18-33.215.

in order to protect themselves in the event of a dispute. The Section expresses no opinion on whether. as a policy matter. those additional. hidden costs are justified from FAA's point of view However, it would appear that they should be considered and balanced against the benefits that will accrue to FAA from inclusion of this provision in its proposed regulations.

3. Filing Contract Disputes – Sections 17.25(a) and (b)

FAA's proposed regulation at §17.25(a) and (b) addresses how a contract dispute is to be "filed." Subpart (a) lists the information that is to be included in the written document: and subpart (b) states that it is to be filed at the office of Dispute Resolution at the FAA.

Clearly, this portion of the regulation was written to address onlv claims submitted by contractors. It should be amended to address claims submitted by the government as well. and to make clear that no government claim is "filed" until the contractor receives a copy of it from the contracting officer.

The Section recommends that §17.25(b) be amended to read as follows:

> **(b)** Contract disputes shall be filed by mail. in person, by overnight delivery or by facsimile. A contract dispute will be deemed "filed" for purposes of the subpart (c) below when it is actually received.
>
> (i) in the case of contractor claims. at the office of Dispute Resolution for Acquisition. AGC-70, Federal Aviation Administration. -400 7th Street. SW.. Room 8332. Washington. D.C. 20590. Telephone: (202) 366-6400. Facsimile: (202) 366-7400; or such other address as shall be published from time to time in the Federal Register: or
>
> (ii) in the case of government claims. at the principal place of business of the contractor or the address listed in the contract as the place of performance.

If this amended version of §17.25((b) is used, §17.25(d) should be deleted; and §17.7(a) should be conformed.

4. The Six Months' Time Limit – Section 17.25(c)

As currently written. Section 17.25(c) states:

> A contract dispute against the FAA shall be filed with the ODRA within six months of the accrual of the contract dispute. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise may be filed within six months after the accrual of the contract dispute. If the contract underlying [sic] provides for time limitations for filing of contract disputes with the ODRA. the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the ODRA a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA claims related to warranty issues. fraud or latent defects.

The Section recommends three modifications to §17.25(c): first, to change the six month time period to six years: second, to make the requirement for filing within the limitation period identical for both contractor and government claims; and third, to impose a reasonable limitation period on FAA claims for warranty issues, fraud or latent defects.

a. The Limitation Period Should Be Six Years

Until 1994, claims against the government that arose under or related to procurement contracts were not subject to any statute of limitations. See, *Farmers Grain Co. of Esmond v. United States. 29* Fed.Cl. 684, 687 *(1993); Pathman Const. Co., Inc. v. United States,* 817 F.2d 1573, 1580 (Fed.Cir. 1987). Except in circumstances where a contractor had already accepted final payment, contractor claims could be submitted at any time subject only to the equitable doctrine of laches, which was rarely applied. The same result occurred in connection with government claims.

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, 108 Stat. 3243 (1994) ("FASA") included a provision which established a six-year statute of

limitation for contract claims brought under the Contract Disputes Act.[11] Other claims against the United States sounding in contract are generally governed by the six-year statute of limitations at 28 U.S.C.§2501[12]

Six months is an unreasonably short amount of time even for an alternative dispute resolution process and it is wholly unworkable if the FAA were to prevail in its view that its contracts are exempt from the CDA. Setting aside the clear advantage to litigants of using a time period that is identical to other comparable statutes of limitation, the Section is concerned that imposing such a short deadline will make it difficult for both contractors and the government to initiate their claims in a timely manner. Particularly in complex multi-year procurements, where all parties are focused on accomplishing the work within the contractual performance period. a six-month time period would require the filing of many potentially undeveloped. incomplete protective claims by both parties in order to avoid waiving or losing entitlement.

The Section believes that as a practical matter, very few claims are or will be filed near the six-year deadline; most are filed much sooner because it is in the contractors' best interests to be paid, and it is in the government's best interests to recoup whatever monies it believes are owing to it. While the Section endorses the principle of encouraging early submission and resolution of claims, however, neither the government nor its contractors should be barred from recovering on legitimate claims - or forced to waste resources filing protective claims - by imposition of a too-short limitations period.

b. The Limitation Period Should Be Identical For Both Contractor and Government Claims

FAA's proposed §17.25(c) states that contractor claims shall" be filed within six months, but it states that FAA claims against a contractor "may" be filed within six months. Whatever limitation period is chosen for use of the FAA's alternative dispute resolution procedures. it should apply equallv to government and contractor claims. There is simply no basis for granting the government more leniency in this regard.

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[11] 41 U.S.C. § 605.

[12] Six years is a typical limitations period for causes of action invoking the United States. *See*, e.g., 28 U.S.C. § 2401(a) general six-vear statute of limitation governing civil actions against the United States); 28 U.S.C. §2415(a) (general six-year statute of limitations governing contract suits by the United States): *but see* 28 U.S.C. $2461 (five-year statute of limitation on actions for civil fines, penalties and forfeitures).

Accordingly, the Section recommends that the word "may" be changed to "shall".

c. Other Limitations Period Contained in FAA Contracts

In some circumstances, FAA contracts may contains clauses which establish a limitations period for the filing of claims which is different than that established by these proposed rules. The Section agrees that the parties to an FAA contract should be able to select their own limitations period, and to voluntarily depart from the mandatory statute of limitations established by these proposed regulations.

Proposed Section 17.25(c) includes a sentence stating that:

> If the contract underlving [sic] provides for time limitations for filing of contract disputes with the **ODRA,** the limitation periods in the contract shall control over the limitation period of this section.

Contractors who respond to government solicitations typically have little or no input as to the specific terms and conditions of the resulting contracts. In order to avoid situations in which contractors are presented with a contract provision establishing a limitations period that departs from that which is established by these regulations -- to which, as a practical matter. they would not be entitled to object -- the Section recommends that this sentence be amended to make clear that the parties may negotiate a different limitations period, but that if they do not agree the default provision in the regulations will be controlling.

Specifically, the Section recommends that the sentence be amended to state: If the contract provides for time limitations for filing of contract claims with the ODRA, the limitation periods in the contract shall control over the limitation period of this section: provided, that any such limitation period. if less than six years, must be agreed to by both parties and a contractor's refusal to accept such a shorter limitation period shall not be grounds for denying award of the contract.

d. Warranty , Fraud and Latent Defects

Finally, proposed Section 17.25(c) excepts FAA claims related to warranty issues, fraud or latent defects from the six-month statute of limitations. The Section agrees that such claims should be treated differently for statute of limitations purposes, because by their nature thev involve information that is unknown to, or. in the case of fraud, actively concealed from, the government. In this instance, establishing a "knew or should have known" standard is appropriate. However, there appears to be no reason not to impose a reasonable time limit for

such claims after they become known to the government; and accordingly the Section recommends that such claims should be filed within six years of the date on which the government knew or should have known about the warranty issue, fraud, or latent defect.

In summary, the Section recommends that §17.25(c) be amended to read as follows:

> (c) A contract claim against the FAA shall be filed with the ODRA within six years of the accrual of the contract claim. A contract claim by the FAA against a contractor (excluding contract claims alleging warrantv issues. fraud or latent defects) shall be filed-with the contractor within six years after the accrual of the contract claim. If the underlying contract provides for time limitations for filing of contract claims with the ODRA, the limitation periods in the contract shall control over the limitation period of this section; provided, that any such limitation period, if less than six years, must be agreed to by both parties and a contractor's refusal to accept such a shorter limitation period shall not be grounds for denying award of the contract. In no event will-either party be permitted to file with the other a contract claim seeking an equitable adjustment or other damages after the contractor has accepted final contract payment. with the exception of FAA claims related to warranty issues. fraud or latent defects. FAA claims based on warranty issues. fraud or latent defects shall. We filed with the contractor within six years of the ate on which the FAA knew or should have known of the presence of the warranty issue, fraud or latent effect.

C. Default Adjudicative Process -- Disputes

1. Lack of the Right to an Adjudicative Hearing

As part of the "default adjudicative process for contract disputes." the parties are to make written submissions to the DRO or Special Master, in which they detail the factual and legal bases for their positions. Proposed § 17.39(f). The DRO or Special Master may decide the dispute on the basis of the written submissions or may, *"in the DRO or Special Master's discretion, allow the parties to make additional presentations at a hearing, and/or in writing"* (emphasis added). See *also* FAA Acquisition Management System ("AMS"), September 1998, ¶ 3.9.3.2.3.2 ('The DRO or Special Master may permit or request oral presentations, if the DRO or Special Master determines that this will facilitate the efficient, effective, and fair resolution of the matter. The DRO or Special Master may limit the presentations to specific witnesses and/or issues.").

Thus, the proposed regulations provide neither party with the right to elect an evidentiary hearing; rather. the decision to conduct a hearing is solely within the discretion of the DRO or Special Master. In addition. the "hearing' contemplated by the proposed regulations appears to be something less than an evidentiary-type hearing; instead, the regulations contemplate "presentations" by the parties, with issues and witnesses potentially limited to those selected by the DRO or Special Master. In short, the proposed regulations provide no assurance of certain "due process" rights that contracting parties traditionally enjoy, such as the rights to be heard, to present evidence, and to cross-examine witnesses on matters in dispute.

Again, the Section understands the FAA's goal of providing an inexpensive and speedy process for the resolution of disputes. but believes that the proposed regulations move too far toward those goals, at the expense of assuring a "just" process. See FED. R. CN. P. 1 (rules should be "construed and administered to secure the just. speedy, and inexpensive determination of every action"). The right to an evidentiary hearing is often critical in fact-intensive contract disputes, and federal contractors have enjoyed such a right. by contract. long before the passage of the CDA. See, e.g., ASPR 7-602.6(a) (196?) ("In connection with any appeal proceeding under this clause, the contractor shall be afforded the opportunity to be heard and to offer evidence in support of its appeal.").

Indeed, the lack of the right to an adjudicative hearing – and the lack of procedural due process that comes with such a proceeding – would arguably invalidate the proposed regulations. Again. pre-CDA practice, and the deliberations of the Commission on Government Procurement, are illuminating:

> A more serious problem often raised in connection with board proceedings today is a conflict between a speedy and economical resolution of disputes and the amount of due process available at the board level.

> While the present boards began after World War II as expeditious, economical forums with relatively little due process, Supreme Court decisions and pressure from the bar have forced the boards in the past 20 years to make more due process available in their proceedings.
>
> * * *
>
> The effect of these decisions [*Bianchi*, *Utah*, and *Grace*] is to require that the parties before a board be given maximum due process under the system, since the board findings on the facts are virtually conclusive. On review. the court will only set aside those findings if they are fraudulent. capricious. arbitrary, so grossly erroneous that they imply bad faith, or are not supported by substantiai evidence. Such requirements on the boards to increase their due process safeguards led to increased formalization of board proceedings.

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Volume 4. at 17 (December 1972).[13]

This background is instructive because the Supreme Court precedent -- and subsequent board practice – suggest that. where an agency's findings on the facts are virtually conclusive due to limited judicial review (as is the case under the FAA's proposed regulations), the parties appearing before an agency in a contract dispute should be assured of maximum due process. Thus. the FAA's proposed regulations, which neither assure the parties of a hearing nor provide the right to present and challenge evidence, are arguably deficient for an admittedly

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[13] The Commission went on to consider two approaches to the boards of contract appeals: (i) treat them as "tools of management designed more to produce negotiated settlements of disputes rather than to adjudicate disputes in a court-like proceeding"; and (ii) treat the boards as "essentially independent. quasi-judicial tribunals." with strengthened procedural safeguards to improve the quality of the record and ensure the board members' independence and objectivity. *Id.* at 19. The latter approach was ultimately recommended. in *conjunction* with direct access to the courts. to provide maximum flexibility. *Id.* at 19-20. Notably, even under the first. more informal approach. "[b]oth parties before the board would be permitted to submit evidence, examine and cross-examine witnesses. and submit written arguments. . .." *Id.* at 19.

adjudicatory process. *See also Alaska Airlines, Inc. v. Civil Aeronautics Board, 545* F. 2d 194 (D.C. Cir. 1976) (holding that the due process requirements of the 5th Amendment required an evidentiary hearing with respect to the scope of an airline's exemption authority: 'Where adjudicative, rather than legislative facts, are involved, the parties must be afforded a hearing to allow them an opportunity to meet and present evidence.").

The Section recommends that the proposed regulations be modified to reflect the importance of adequate due process mechanisms in a contract dispute, including the right to elect an evidentiary hearing. Such modifications are necessary to ensure that the FAA's dispute resolution process is just.

2. Lack of the Right to Full Discovery

As part of the default adjudicative process. the DRO or Special Master determines the *'minimum amount of discoverv required to resolve the dispute." Proposed §17.39(e)(1). Thus, the parties are not free to decide for themselves the **discovery that** is **necessary** and appropriate in **a** particular case, nor are they **assured** of **being able to** do more than the "minimum" discovery in a given **case.** Indeed, they **are** not assured of a "minimum."

Again, the Section believes that such arbitrary restrictions on discovery are **unnecessary** and inappropriate in a contract case. There are certainly cases in which only "minimum" discovery is appropriate, but there **are** other cases – particularly cases involving significant damages – **where** restricting **a** party to minimum discovery may be prejudicial. For example, it is often the case in government procurement that information about a critical issue in dispute is in the possession or control of numerous witnesses. If the contractor is limited in that situation to a Rule **30(b)(6)** deposition. for example. it may never learn information that is essential to the claim. Each party should control such discovery decisions for itself, subject only to the long-established rules of reasonableness and **relevance.**

In short, the lack of the right to full discovery may deny a partv the due process to which it is entitled in a contract dispute. The Section recommends that the proposed regulations be modified to ensure that parties have full discovery rights in contract disputes.

3. Interest

Section **17.34(m)** provides in part:

> . If required by contract or applicable law, the FAA will pay interest on the amount found due the contractor, if any.

Currently, the standard FAA "Disputes" clause (§ 3.9.1-l) provides for the payment of interest on contractor claims, although on terms different from the CDA.

As discussed above, the Section does not believe the FAA is exempt from the CDA. Under the CDA interest runs from the date the certified claim is submitted to the contracting officer regardless of when the costs are actually incurred. See *Caldera v. J.S. Alberici* Construction Co. 153 F.3d 1381 (Fed. Cir. 1998). Under the FAA clause, interest is payable from the later of "(1) the date the Contracting Officer receives the contract dispute, or (2) the date payment otherwise would be due . . ." Clause 3.9.1-1(l).

The Section recommends that, at a minimum, the FAA provide. by regulation, entitlement to interest. Even if the FAA is correct that its procurements are not subject to the CDA, the ability to obtain interest on claims should not be matter of negotiation on individual contracts. Under the current proposal, uncertainty concerning the availability of interest will provide further incentive for contractors to bypass the FAA's dispute procedures and challenge their legal validity.

VI. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David A. Churchill
Chair, Section of Public Contract Law

cc: [Insert Standard List]